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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS,
SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether a litigant in federal district court who does not initially advance an argument that is foreclosed by the law of the Circuit is precluded from making that argument when this Court subsequently issues a decision overturning the Circuit precedent.

PARTIES

Petitioners are the District of Columbia and several of its officials all of whom were sued in their official capacity: Dr. Franklin L. Smith, Superintendent, District of Columbia Public Schools ("DCPS"); Dr. B. Garnett Pinkney, Assistant Superintendent — Special Education, DCPS; and Dr. Constance Clark, Associate Superintendent, DCPS, as successor in interest to Dr. Doris Woodson. Respondents, who were plaintiffs below, are Sarah Kattan and her parents, Joseph Kattan and Susan J. Thomas.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The District of Columbia and several of its officials petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The June 15, 1993, decision of the United States Court of Appeals for the District of Columbia Circuit (App. 13a-25a) is not reported. The D.C. Circuit's June 30, 1993, decision, which amended its June 15 decision, is reported at 995 F.2d 274. App. 1a-12a. The December 11, 1991, decision of the United States District Court for the District of Columbia (App. 33a-35a) is not reported.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. On July 7, 1993, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion were denied on October 6, 1993. App. 37a, 38a.

On November 22, petitioners filed an application for an extension of time in which to file their petition for a writ

of certiorari. On November 23, the Chief Justice extended the time for filing the petition to February 8, 1994. App. 39a. On January 21, petitioners filed a supplemental application for an extension of time. On January 24, the Chief Justice extended the time for filing the petition to February 10.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

This case involves the following statutory provisions and court rules:

Fed. R. Civ. P. 59(e): "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

20 U.S.C. § 1415(e)(4)(B): "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents . . . of a handicapped child or youth who is the prevailing party."

28 U.S.C. § 2106: "The Supreme Court or any other court of appellate jurisdiction may . . . reverse any judgment . . . of a court lawfully brought before it for review . . . as may be just under the circumstances."

STATEMENT OF THE CASE

The D.C. Circuit has held that the District of Columbia may not invoke this Court's decision in *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), barring fee awards to *pro se* attorneys under federal fee-shifting statutes, because it did not dispute the then-controlling Circuit precedent, permitting such fee awards, in its initial opposition to a fee application in 1988. This Court should reverse that decision because it conflicts with the decisions of this Court, is fundamentally unfair, and undermines the efficient administration of justice.

I. BACKGROUND.

This suit was brought pursuant to the Individuals with Disabilities Education Act ("IDEA")[1] on behalf of Sarah Kattan, a handicapped child, by her parents, on March 9, 1988, against the District of Columbia seeking an order requiring payment of her private school tuition. Sarah and her parents were initially represented by her father, an attorney. At the urging of the trial court, the Honorable Joyce Hens Green, he secured co-counsel and the Kattans prevailed on the merits on August 9, 1988.

On October 11, 1988, Mr. Kattan and his co-counsel submitted an application for attorney's fees pursuant to 20 U.S.C. § 1415(e)(4)(B).[2] In that application, they cited *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), as establishing as the law of the D.C. Circuit the rule that *pro se* attorneys may recover fees under federal fee-shifting statutes. In *Cuneo*, the D.C. Circuit, relying on a Fifth Circuit civil rights case, ruled that attorneys proceeding *pro se* could recover fees under the Freedom of Information Act ("FOIA"). Given *Cuneo* and this Court's repeated admonition that similar language in federal fee-shifting provisions should be construed in the same fashion, the District did not dispute that *Cuneo* was controlling and the propriety of the fees sought was otherwise briefed in October and November, 1988.

Nearly three years later, on October 17, 1991, Judge Green entered an order awarding attorney's fees, including fees to Mr. Kattan for his work. On October 31, the District filed a timely motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment. In this motion, the District cited this Court's April, 1991, decision in *Kay v. Ehrler* that fees

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[1] 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.* (1988 ed. and Supp. IV). The IDEA was formerly named the Education of the Handicapped Act ("EHA") and the Handicapped Children's Protection Act ("HCPA").

[2] It provides: "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents . . . of a handicapped child or youth who is the prevailing party."

may not be awarded under 42 U.S.C. § 1988 to attorneys who represent themselves. The District urged that *Kay v. Ehrler* barred any fee award under the IDEA to Mr. Kattan for his own legal work.

II. THE TRIAL COURT'S DECISION.

Judge Green initially purported to deny the District's motion on the ground that it had waived the issue three years earlier in 1988 when it responded to the fee application. Furthermore, Judge Green, without even referring to the D.C. Circuit's decision in *Cuneo*, also rejected the District's argument that its "Rule 59 motion is based on a change of law not reasonably anticipated . . .. App. 34a n.1. In Judge Green's view, because a federal district court judge in the District of Columbia had ruled in 1984 that *pro se* attorneys may not recover fees under 42 U.S.C. § 1988, the District should have anticipated in 1988 this Court's 1991 decision in *Kay v. Ehrler* and thus should have raised the issue in opposing the fee application at the outset. App. 34a n.1, citing *Lawrence v. Staats*, 586 F. Supp. 1375, 1378-80 (D.D.C. 1984).[3]

Judge Green nevertheless reached the merits, and she ruled that the District's interpretation of *Kay v. Ehrler* was wrong:

> . . . [P]laintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision. And defendants have not cited any legislative history or caselaw that supports defendants' argument to extend the ambit of *Kay v. Ehrler* to EHA cases. Consequently, defendants' motion to alter or amend the judgment must be denied.

App. 34a.

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[3] This decision was appealed in 1984 by the unsuccessful *pro se* attorney, and, after pending in the court of appeals for nearly seven years, it was affirmed following *Kay v. Ehrler*. *Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991).

III. PROCEEDINGS IN THE DISTRICT OF COLUMBIA CIRCUIT.

A. Its June 15 Decision.

On June 15, 1993, a divided panel of the D.C. Circuit affirmed. The majority (Mikva, C.J., & Sentelle, J.) never reached the merits. Instead, it ruled *sua sponte* that the District's Rule 59(e) motion had been filed out of time and, as a consequence, held that Judge Green "should not have reached the merits of the . . . motion." App. 17a. According to the majority, Rule 59(e) motions must be filed within ten calendar days after entry of the judgment, and the District's motion was tardy because it was filed on October 31, 14 days after entry of the judgment on October 17. As a result, the majority treated the fee issue as if it had been raised for the first time on appeal and analyzed the propriety of deciding it under 28 U.S.C. § 2106.[4] In its view, the cases allowing review under section 2106 were distinguishable because, in those cases, "the intervening decision enunciated a new legal principle that was previously unavailable . . . for all practical purposes." App. 18a. According to the majority, the District should have urged in 1988 that *Cuneo*, a FOIA case, was distinguishable. Thus, overlooking *Cuneo's* reliance on a civil rights case permitting fee awards to *pro se* attorneys and this Court's command that similar language in federal fee-shifting statutes should be consistently interpreted, the majority stated that, because *Cuneo* relied on the policies underlying FOIA, the District had "*no basis* to believe that *Cuneo* settled the HCPA question." App. 19a (emphasis added). In its view, "[s]uch an argument would have been far from frivolous" because, in distinguishing

[4] 28 U.S.C. § 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may . . . reverse any judgment . . . of a court lawfully brought before it for review . . . *as may be just under the circumstances.*" (Emphasis added). In its briefs before the panel, the District had cited cases interpreting this provision in support of its argument that it could bring before the trial court in a Rule 59(e) motion the change of law wrought by this Court in *Kay v. Ehrler*. The District had urged that any legal issue that may be raised for the first time on appeal necessarily may be raised for the first time before appeal in a Rule 59(e) motion.

Cuneo, "the District could [have] look[ed] to [the district court's 1984 decision in] *Lawrence*," which found policy differences between FOIA and section 1988.[5] *Id.* The majority held: "Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees *in its original opposition* to the Kattans' application for fees, we find that the District waived the issue and *cannot raise it for the first time on appeal.*" App. 23a (emphasis added).

Judge Douglas H. Ginsburg dissented. In his view, Judge Green's distinction between section 1988 and the IDEA fee provision "is the proverbial distinction without a difference." App. 24a. Thus, given this Court's repeated admonitions that similar language in fee-shifting provisions should be consistently construed and this Court's decision in *Kay v. Ehrler*, Judge Green's "grant of a fee for the work performed by Mr. Kattan was clearly an error." *Id.*

Judge Ginsburg also rejected the majority's waiver analysis:

> The District of Columbia had no reason in 1988 to anticipate that the Supreme Court would in 1991 change the law of this circuit, which then authorized the district court to award an attorney's fee to a *pro se* litigant. On the contrary, the district court was clearly bound both by *Cuneo* . . . and by the Supreme Court's longstanding command that similarly-worded fee-shifting provisions are to be treated alike. The distinction the district court drew in *Lawrence* . . . ran contrary to the Supreme Court's approach. *See Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (affirming "[s]olely" on the basis of intervening Supreme Court decision in *Kay v. Ehrler*, which overruled *Cuneo*). *But see* Ct. Op. at 7 [App. 19a] (lauding the district court for "a well-reasoned opinion" in *Lawrence* . . .).

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[5] Finding the district court's decision in *Lawrence* in 1988 was not easy, however, because that decision never cited *Cuneo*. Thus, had a litigant "shepardized" *Cuneo*, it would not have found the district court's decision in *Lawrence*.

> It is simply unreasonable to penalize the District . . . for failing to have argued a distinction (between the fee provision of the FOIA and that of the HCPA) that the district court would have been required to reject under Supreme Court and circuit precedent. By holding that the District waived the issue of Mr. Kattan's eligibility for fees, the court is in effect punishing a litigant for not making what would have been at the time an almost frivolous argument.

App. 25a

B. Rehearing.

On July 7, the District of Columbia filed a timely petition for rehearing and rehearing *en banc*. The District sought review of the panel majority's rulings (1) that its Rule 59(e) motion had been filed out of time and thus that Judge Green had erred in reaching the merits of the motion and (2) that the District could not invoke this Court's 1991 decision in *Kay v. Ehrler* because it failed in 1988 to attempt to distinguish the D.C. Circuit's contrary 1977 decision in *Cuneo*.

On the first point, the District urged that the majority had overlooked a critical provision of Fed. R. Civ. P. 6(a), which provides that intermediate Saturdays, Sundays, and legal holidays are to be excluded in computing time periods of fewer than 11 days. When Rule 6(a) is considered, the District's Rule 59(e) motion was timely, because excluding weekends, it was filed and served on the tenth day after entry of the judgment. As a consequence, the majority had erred in ruling *sua sponte* that it was not timely and thus that Judge Green should not have reached the merits.

The District also sought rehearing of the majority's waiver ruling. It urged, *inter alia*, that, in 1988, the D.C. Circuit's 1977 ruling in *Cuneo* was controlling and that it could not reasonably have anticipated that this Court would issue a contrary decision in 1991. The District also urged that the majority's decision to raise *sua sponte* the timeliness of its

Rule 59(e) motion seriously conflicted with the majority's ruling that the fee issue was not cognizable on appeal.

Both the petition for rehearing and the suggestion for rehearing *en banc* were denied on October 6, 1993. Judge Ginsburg would have granted the petition and Judge Stephen F. Williams, the suggestion. App. 37a & 38a.

C. Events Following Denial Of Rehearing.

Following denial of rehearing, the District decided to seek review in this Court. On November 18, however, it discovered that there was a significant disparity between the decision the D.C. Circuit had transmitted to it and for which it had sought rehearing and the decision reported at 995 F.2d 274. The reported decision, moreover, contained the notation "As amended June 30, 1993." App. 1a. It differed from the decision issued on June 15 in two principal respects: (1) it does not contain the holding that the District's Rule 59(e) motion was untimely (*compare* App. 4a *with* App. 17a) and thus that Judge Green had wrongfully reached the merits; and (2) it contains a new discussion of Rule 59(e) (*compare* App. 4a-5a *with* App. 17a), as follows:

> Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings.
>
> *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 711 (D.C. Cir. 1973), *overruled on different grounds*, 421 U.S. 168, 95 S. Ct. 1491, 44 L.Ed.2d 57 (1975). *See also Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (Rule 59(e) motion "cannot be used to raise arguments which could, and should, have been made before the judgment issued.").

App. 5a.

The District had never received any amended decision and it had never been notified that any amendment had been

made. Nor had the Kattans. Furthermore, the Clerk's Office for the D.C. Circuit could not locate any amended decision and the docket maintained by that Office pursuant to F.R.A.P. 36 & 45(b), (c) & (d) did not contain any indication that the June 15 decision had been amended. See App. 42a.

On November 22, the District, citing these surprising developments, filed a motion to clarify and vacate in the D.C. Circuit and an application for an extension of time in this Court for filing their petition for a writ of certiorari. The motion to clarify and vacate argued that, if the decision of the panel had been amended, the D.C. Circuit should vacate its order entering judgment in the appeal for the reasons stated in the June 15 decision and enter a new judgment so that the District could seek full and fair rehearing in the Circuit.[6]

On November 23, the Chief Justice granted the District's application for an extension of time. App. 39a. Over two weeks later, on December 9, the original three-judge panel issued an order "on the court's own motion, that the District of Columbia submit a supplemental memorandum of no more than five pages setting forth any argument that it was unable to make in its petition for rehearing/suggestion for rehearing *en banc* because it did not receive the court's June 30, 1993, order." App. 40a. The District was given a week, until December 16, to comply. App. 40a.

The District filed a supplemental memorandum on December 14. One week later, on December 21, the panel issued an order denying the motion. App. 41a.

The District then proceeded with this petition in the belief that the panel, in its orders of December 9 and 21, had given sufficient indication that the majority's June 15 decision had

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[6] Assuming that the June 15 decision had been amended and that the full court had been provided with the amended decision, the District's rehearing petition likely would have been viewed with disfavor because it addressed an issue that was not in the case and failed to address an issue that was in the case.

been amended even though no amended decision had been docketed in the D.C. Circuit or served on the parties. App. 42a-43a.

REASONS FOR GRANTING THE WRIT

A divided panel of the D.C. Circuit has wrongly imposed on litigants in federal district courts a requirement that they dispute adverse controlling Circuit precedent in order to invoke a supervening change of law by this Court in their favor. As a consequence, the court wrongly refused to decide whether *Kay v. Ehrler*, which bars fees to *pro se* attorneys under 42 U.S.C. § 1988, also bars fees to *pro se* attorneys under the indistinguishable fee provision of IDEA.

The decision of the D.C. Circuit is in conflict with the decisions of this Court. This Court's decisions impose obligations on federal courts to ascertain what the law is and to apply it correctly. These decisions also allow litigants more leeway to invoke a supervening change of law in their favor and do not require them to challenge a binding adverse precedent as a condition of doing so. The decision of the D.C. Circuit is also in conflict with the decisions of other Circuits.

The D.C. Circuit's rule is bad policy. It forces trial counsel to make arguments that reasonably appear to be foreclosed by Circuit precedent and will thus require district court judges to squander their scarce resources deciding such arguments. Furthermore, the D.C. Circuit's rule will result in the proliferation of motions for sanctions and in an increase in the number of orders imposing sanctions. Because the D.C. Circuit's rule requires counsel to attempt to distinguish controlling adverse Circuit precedent in order to invoke a subsequent change of law by this Court in favor of their client, they necessarily must make arguments that will precipitate motions for sanctions and that will be viewed by busy federal district court judges as frivolous.

This case is similar to, but far more important than, *Elder v. Holloway*, No. 92-8579 (argued January 10, 1994). In both cases, the overriding issue is whether a federal appellate court is obligated to decide cases properly before it in accordance

with the law or whether it may allow a judgment of a federal district court to stand which it knows to be wrong. In *Elder*, the Ninth Circuit affirmed a judgment of a federal district court even though the judgment conflicted with one of its own decisions governing the constitutionality of arrests made without a warrant. In this case, the D.C. Circuit affirmed a judgment awarding attorney's fees even though the judgment conflicted with a decision of this Court. The decisions of both the Ninth and the D.C. Circuits are a serious departure from the fundamental principles of judicial decision-making announced by this Court.

This case is far more important than *Elder* for several reasons. First, the decision here necessarily affects a far greater number of cases than the Ninth Circuit's decision in *Elder*. In *Elder*, the problem arose because trial counsel failed to cite (and the district court judge apparently did not find) a controlling Circuit precedent in his client's favor. Here, the problem arose because trial counsel for the District of Columbia failed to dispute the applicability of an adverse Circuit precedent that counsel for both parties (and apparently the district court) reasonably believed to be controlling. Thus, while *Elder* involves a fairly unusual problem — trial counsel's failure to cite an extant controlling Circuit precedent in his client's favor — this case involves a problem that arises whenever a federal appellate court adopts, as the law of the Circuit, a legal rule with which this Court subsequently disagrees. This problem necessarily arises whenever this Court, as it frequently does, resolves a conflict among the Circuits.

Second, the decision here is far more unfair to litigants. It is one thing to punish a litigant because his counsel at the district court level failed to cite a controlling Circuit precedent in his favor. It is quite another thing to punish a litigant because his counsel at the district court level failed to attempt to distinguish controlling, adverse Circuit precedent and sought to litigate an issue only after this Court issued a contrary, favorable ruling. In the latter set of circumstances, a litigant is punished not for any carelessness on the part of his counsel but because a federal appeals court

misapprehended the very law it is charged with construing correctly.

The decision here is more unfair than *Elder* for yet another reason. There are no disincentives for trial counsel to cite a controlling Circuit precedent in their client's favor. By contrast, trial counsel who attempt to distinguish adverse controlling Circuit precedent run the risk of having a Rule 11 motion (Fed. R. Civ. P. 11) filed against them and the risk of having sanctions imposed by busy trial court judges.

Finally, the decision here has far graver consequences than *Elder* for the efficient and fair operation of the federal courts. The Ninth Circuit's *Elder* rule is likely to provide even one more, and ordinarily superfluous, incentive for trial counsel to identify controlling Circuit precedent in their client's favor. This additional incentive can only ease the burdens of federal district court judges. By contrast, the D.C. Circuit's rule will require tenuous, even untenable, motions to be filed and decided, and will precipitate collateral motions for sanctions and decisions on those motions.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION VIOLATES THE PRINCIPLE THAT FEDERAL COURTS HAVE AN OBLIGATION TO DECIDE CASES LAWFULLY BEFORE THEM IN ACCORDANCE WITH THE LAW.

A. This Court Repeatedly Has Ruled That Federal Courts Must Decide Cases In Accordance With The Law.

This Court has long held that federal courts have the responsibility to ascertain what the law is and to apply it correctly in resolving disputes properly before them. As this Court has stated, because "judgments are precedents," the obligation to decide cases in accordance with the law "cannot be left merely to the stipulation of the parties," but rests squarely on the courts. *Young v. United States*, 315 U.S. 257, 259 (1942). *See also, e.g., Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n.10 (1969); *Orloff v. Willoughby*, 345 U.S. 83, 87-88 (1953); *Town of South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877).

Thus, for example, in *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990), this Court *sua sponte* construed a federal statute to dispose of the case on a ground neither decided by the court below nor argued in this Court. This Court construed the statute *sua sponte* because, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991). Similarly, in *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173 (1993), this Court ruled that the D.C. Circuit acted properly when it decided whether the federal statute governing the case was valid although the validity of the statute had not been raised in the district court or even in the briefs and oral argument on appeal.

This Court has also ruled that Fed. R. Civ. P. 59(e) is a proper vehicle for raising similar legal issues for the first time at the trial level. Thus, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court ruled that a federal district court acted properly in entertaining a post-trial motion challenging jury instructions even though the movant had earlier failed to object to these instructions in violation of the "uncompromising" directive of Fed. R. Civ. P. 51. *Id.* at 255. And in *Leary v. United States*, 395 U.S. 6 (1969), this Court ruled that a criminal defendant could raise for the first time in a post-trial motion the issue whether the privilege against self-incrimination was a defense to his prosecution. Because at the time of trial, the law of the governing Circuit prohibited invocation of the privilege in the circumstances of defendant's case and this Court had not yet issued its contrary ruling, "his failure to raise the issue at that time did not amount to a waiver . . .." *Id.* at 27-28.

The D.C. Circuit's rulings here — that the District waived the argument that the IDEA does not permit a *pro se* attorney to recover fees; that the District could not invoke this Court's supervening favorable decision in a Rule 59(e) motion; and that Judge Green somehow acted improperly

in deciding the District's motion on the merits — conflict with the decisions of this Court. Thus, this Court's decision in *Arcadia, Ohio* to construe *sua sponte* the federal statute governing the case surely permitted Judge Green to reach the merits of the District's argument that the federal fee-shifting statute at issue here does not permit an award of fees to *pro se* attorneys. Similarly, if, as this Court ruled in *Fact Concerts*, a federal district court acts properly in deciding the merits of a post-trial motion challenging jury instructions, surely Judge Green acted properly in deciding the merits of the District's post-judgment motion addressed to the issue whether Congress has authorized fees to *pro se* attorneys. Finally, if, as this Court ruled in *Leary*, a defendant may raise for the first time in a post-trial motion a decision of this Court overturning adverse Circuit precedent, then surely the District was permitted to invoke *Kay v. Ehrler* in a Rule 59(e) motion.

Had the panel majority reached the merits, it would have been compelled to rule that *Kay v. Ehrler* bars a fee award to IDEA *pro se* litigants. First, in *Kay v. Ehrler*, this Court ruled that "an attorney who represents himself in a successful civil rights action may" not "be awarded a reasonable attorney's fee . . ., under 42 U.S.C. § 1988." 111 S. Ct. at 1435-36. According to this Court, "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." *Id.* at 1437 (footnotes omitted). Second, this Court repeatedly has ruled that similar language in federal fee-shifting provisions should be interpreted in the same way. *See, e.g., City of Burlington v. Dague*, 112 S. Ct. 2638, 2641 (1992); *Independent Federation of Flight Attendents v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (§ 1988 and fee provision of Title VII should be "interpreted alike"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (fee provision of Clean Air Act should be interpreted like § 1988).

As even the panel majority acknowledged, the language of IDEA's fee-shifting provision is identical in all relevant

respects to section 1988. See App. 3a. Accordingly, *Kay v. Ehrler* bars a fee award to IDEA *pro se* litigants.

B. The Legal Issue Here Properly Could Have Been Raised For The First Time On Appeal.

The panel majority correctly acknowledged that appellate courts have the power " 'not only to correct error in the judgment under review but to make such disposition of [a] . . . case as justice requires' " and that, " 'in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.' " App. 7a, quoting *Patterson v. Alabama*, 294 U.S. 600, 607 (1935). *See also supra* at 5 n.4. However, according to the majority, before an issue may be raised for the first time on appeal based on a change of law, there must be "exceptional circumstances" and/or "the intervening decision [must] enunciate[] a new legal principle that was previously unavailable . . . for all practical purposes." App. 8a, 7a.

This is not a correct statement of the law, as even the decisions of this Court cited by the panel majority make clear. Thus, in *Hormel v. Helvering*, 312 U.S. 552 (1941), this Court, citing the need to protect the public fisc, permitted the government to raise a new legal issue on appeal even though it had not been foreclosed from making the argument earlier. This Court stated that an appellate court should review an issue raised for the first time on appeal when, for example, "there have been judicial interpretations of existing law after decision below and pending appeal — interpretations which if applied might have materially altered the result." *Id.* at 558-59. It explained:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557. As this Court also explained, the general rule that a federal appeals court does not consider issues not raised below is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 556. *Accord Singleton v. Wulff*, 428 U.S. 106, 120 (1976).[7]

This Court has not, therefore, announced any "exceptional circumstances" test for determining whether a party may raise an issue for the first time on appeal. Nor has this Court ruled that, before an issue may be raised for the first time on appeal based on a change of law, the new decision must announce a legal principle that was previously unavailable for all practical purposes. Instead, this Court has weighed heavily the fundamental principle that disputes should be resolved in accordance with the law; has made clear that rules of procedure are not ends in themselves; and has inquired whether permitting a litigant to raise an issue for the first time on appeal would unfairly prejudice the other parties to the dispute by denying them the opportunity to introduce evidence relevant to the issue.

In this case, the panel majority never made any inquiry into whether it would be fair to permit the District to invoke this Court's decision in *Kay v. Ehrler*. Instead, it proceeded to apply woodenly a general rule that issues may not be raised for the first time on appeal, even though the District, in fact, raised the issue below, even though the trial court decided the issue and plainly misconstrued the law, and even though the reason for that rule does not apply here.

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[7] The panel majority cited two other decisions of this Court, *Leary v. United States*, *supra*, and *Patterson v. Alabama*, *supra*. As we have already explained, however, *Leary* would permit review here and thus provides no support for the D.C. Circuit's ruling. *See supra* at 13 & 14. Nor does *Patterson*. In *Patterson*, this Court remanded a criminal case to a state supreme court to permit it to re-examine its ruling that the defendant's procedural error under state law precluded him from raising a federal constitutional claim that this Court had resolved favorably to another person convicted of the same crime in a separate case.

II. THE D.C. CIRCUIT'S WAIVER RULING IS IN CONFLICT WITH THE RULINGS OF OTHER CIRCUITS.

The D.C. Circuit's waiver ruling is in conflict with the decisions of other Circuits. *See, e.g., Morris v. American National Can Corp.*, 988 F.2d 50 (8th Cir. 1993); *Weaver v. Bowers*, 657 F.2d 1356 (3rd Cir. 1981) (*en banc*), *cert. denied*, 455 U.S. 942 (1982).

In *Morris*, the Eighth Circuit ruled that a defendant in a civil rights case could invoke *City of Burlington v. Dague*, *supra*, in which this Court ruled that a lodestar fee award under the typical federal fee-shifting statute can never be enhanced to compensate for risk, even though the defendant had not raised that issue either in the district court or in the first appeal in the case. Indeed, in the first appeal, an appeal by the plaintiff who had been denied risk enhancement, the defendant had urged that Justice O'Connor's opinion in *Delaware Valley II* (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)), was controlling, and the Eighth Circuit, which already had adopted her opinion as the law of the Circuit, had reversed and remanded the case. The district court then entered a risk enhancement of 50 percent, and 19 days later, this Court issued its decision in *Dague*. In ruling that the defendant could invoke *Dague*, the Eighth Circuit declined to find that the defendant had waived this argument by not raising it either at the trial level in the first instance or in the first appeal.

Similarly, in *Weaver*, the Third Circuit permitted defendants to litigate, in a Rule 59(e) motion, the issue whether this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), applied retroactively. The Third Circuit did so, moreover, even though a trial could have been avoided had defendants successfully raised the issue earlier, and even though defendants' reasons for not raising the issue earlier were "unpersuasive" in light of the fact that the issue was open in the Third Circuit and other federal courts of appeals had decided it favorably to defendants. *Id.* at 1361. The Third Circuit

reached the merits in order "to vindicate one of the most fundamental jurisprudential concerns, evenhandedness in the administration of justice." *Id.* at 1362. In its view, this fundamental concern required it to apply the same rule of law to similarly situated litigants.

Both *Morris* and *Weaver* squarely conflict with the decision of the D.C. Circuit here. Neither the Eighth nor the Third Circuit requires that there be "exceptional circumstances" before a litigant may invoke a change of law by this Court in its favor. Neither Circuit, moreover, requires a litigant seeking to invoke such a change of law to demonstrate that the defense it seeks to raise was unavailable for all practical purposes when it first could have been asserted.

The two cases cited in the panel majority's amended decision in support of its Rule 59(e) ruling are not to the contrary. Thus, in *Grumman Aircraft Eng'g Corp. v. Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975), the D.C. Circuit described Rule 59(e) as a "rule requiring *clearly available defenses*" to be raised before rehearing. *Id.* at 721 (emphasis added). And, in *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260 (7th Cir. 1986), the Seventh Circuit stated that a proper Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence" and that, conversely, Rule 59(e) "cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Id.* at 1268.

Under those tests, the District would have been permitted to invoke *Kay v. Ehrler* in its Rule 59(e) motion. The panel majority here never ruled, and could not rule, that the District had a "clearly available defense" at the time of the fee application. Furthermore, Judge Green's fee decision, as Judge Ginsburg observed, constitutes a manifest error of law. *See also infra* at 19-21.[8]

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[8] That the test adopted by the panel majority here is substantially different from the tests adopted in *Grumman* and *Meyer* is also illustrated by examining the facts of those cases. First, in *Grumman*, the moving

[Footnote continued on the next page]

In short, the Circuits are in conflict over an important and recurring issue that this Court should resolve — whether a litigant's reasonable reliance on the law of the Circuit in which his dispute is resolved precludes that litigant from invoking a supervening change of law by this Court in his favor.

III. A LITIGANT'S FAILURE TO DISPUTE ADVERSE APPLICABLE CIRCUIT LAW SHOULD NOT PRECLUDE IT FROM INVOKING A SUPERVENING DECISION BY THIS COURT IN ITS FAVOR.

A. Prior to *Kay v. Ehrler*, The Law In The District Of Columbia Was That *Pro Se* Attorneys May Recover Fees Under Federal Fee-Shifting Statutes.

The panel majority erred in ruling that the District committed a fatal misstep in 1988 by failing to attempt to distinguish the D.C. Circuit's 1977 decision in *Cuneo*. As Judge Ginsburg correctly recognized, the District had every reason to believe that *Cuneo* foreclosed a challenge to the *pro se* attorney's fee award here. In *Cuneo*, the D.C. Circuit treated the fee-shifting provision of FOIA like any other federal fee-shifting provision. Not only did it refer to "current federal attorney fee statutes," but it cited in support of its ruling a civil rights decision by the Fifth Circuit. 553 F.2d at 1366. Furthermore, the policies underlying FOIA's fee provision, which were cited in *Cuneo*, do not differ in any material respect from the policies underlying the fee provisions of federal civil rights statutes, including the IDEA. Thus, in 1988, given *Cuneo* and given this Court's longstand-

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[Footnote continued from the previous page]
party sought to invoke a legal defense so well-established that the court viewed the government's conduct as a deliberate by-pass. 482 F.2d at 722 (government was playing "cat and mouse"). Second, in neither *Grumman* nor *Meyer* could any claim have been made that the moving party reasonably relied on controlling Circuit precedent in not litigating an issue earlier. Third, in contrast to *Grumman* and *Meyer*, the trial court here decided the merits of the Rule 59(e) motion, and because there can be no claim that she abused her discretion in doing so, her merits decision was properly before the D.C. Circuit. Finally, both *Grumman* and *Meyer* involved factual matters.

ing command that similar language in federal fee-shifting statutes should ordinarily be consistently construed, the law of the D.C. Circuit was that an attorney who successfully represents himself in a case governed by a federal fee-shifting statute is entitled to fees.

The reasonableness of this interpretation is confirmed by post-1988 events in the D.C. Circuit. Thus, in *Jones v. Lujan*, 883 F.2d 1031 (D.C. Cir. 1989), the D.C. Circuit extended *Cuneo* to fees sought pursuant to the Equal Access to Justice Act ("EAJA"). In so ruling, the panel majority rejected the very arguments that this Court later found persuasive in *Kay v. Ehrler* and even characterized these arguments as "rather strange." *Id.* at 1034. Judge Silberman, in turn, who concurred in the judgment although he believed it to be wrong, explained that he was bound by *Cuneo*, even though *Cuneo* was a FOIA case, because he could find "no viable distinction . . . between the term 'reasonable attorney fees' in FOIA . . . and 'reasonable attorney fees' in EAJA . . .." *Id.* at 1036.

There was, therefore, no reasonable basis for believing, prior to *Kay v. Ehrler*, that the D.C. Circuit would have held that *pro se* attorneys may not recover fees under the IDEA, § 1988, or any other federal fee-shifting statute. Indeed, as Judge Ginsburg observed, the D.C. Circuit's 1991 affirmance of the district court's 1984 decision in *Lawrence* was based solely on *Kay v. Ehrler* and did not cite the varying-purposes distinction made by the district court in *Lawrence* and invoked by the panel majority here.

Finally, the reasonableness of the District's position in 1988 is underscored by a decision of the D.C. Circuit issued less than three weeks before the original decision in this case. In *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir.), *cert. denied*, 114 S. Ct. 559 (1993), a three-judge panel (Mikva, C.J.; Edwards & Buckley, JJ.) held that *Kay v. Ehrler* bars an award of attorney's fees to a non-attorney *pro se* litigant who prevails in a FOIA case. In *Benavides*, the panel unanimously rejected arguments made by "extremely competent counsel," appointed by the court itself for the appeal,

that *Kay v. Ehrler* was distinguishable because the purposes of FOIA's fee provision differ from those of section 1988. *Id.* at 258 n.*. Not only did the panel reject these arguments, it ruled that they were "untenable" and "simply do not hold." *Id.* at 259, 260. In *Benavides*, therefore, the D.C. Circuit, when presented with the only distinction the District could have made between *Cuneo* and its own case, ruled that the distinction was indefensible.

In short, in this case, the D.C. Circuit has upheld an award of attorney's fees that Congress has not authorized and has thus violated its fundamental obligation to apply the law faithfully. The reason for its ruling is, moreover, seriously flawed. According to the panel majority, a litigant waives the right to invoke a change of law by this Court in its favor unless it attempts to distinguish a controlling adverse Circuit precedent so long as two judges hearing the appeal can articulate *hypothetically* a "reasonable" distinction between the two cases. A distinction can be deemed fatally "reasonable," moreover, even though, just three weeks earlier, the distinction has been held to be "untenable" by a unanimous three-judge panel of the same court (which included one judge who also believes it to be reasonable!).

Such a harsh standard cannot be the law. A litigant should not be required to attempt to distinguish the indistinguishable in order to invoke a change of law by this Court in its favor. Furthermore, as a general matter, a litigant should not be expected to anticipate that this Court will disagree with the law of the Circuit governing its case. Here, moreover, there was no reasonable ground to do so in the D.C. Circuit until *Kay v. Ehrler* was decided.

B. Fairness To Litigants And To Their Counsel, As Well As Judicial Efficiency, Require Review Here.

The D.C. Circuit's rule will result in great unfairness to litigants and to their trial counsel and in increased burdens on federal district courts. This is because in the federal judicial system, the only law that may exist on an issue is the law created by the Circuits. The law of a Circuit, even

if it is in conflict with the law of another Circuit, is binding on the litigants and the federal district court judges within the Circuit.

The D.C. Circuit's too-stringent waiver and Rule 59(e) standards will unfairly and unwisely force trial counsel to choose between the rock of waiver and the hard place of sanctions. Counsel will have to defend against a waiver argument if they fail to attempt to distinguish a Circuit precedent they reasonably believe to be controlling or they will have to defend against a motion for sanctions if they attempt to do so. And a busy district court judge will not be inclined, as was the panel majority here, to conclude that an untenable argument is nevertheless reasonable. Attorneys must be given some leeway to choose a course of action on behalf of their clients without fear of waiver or sanctions.

The dilemma created by the D.C. Circuit's rule cannot be avoided by the fact that a litigant can undertake the costly and risky task of seeking to overturn Circuit precedent that adversely affects its case in some way. First, not every litigant has the resources necessary to pursue such litigation and not every case involves the financial incentives that would make this course of action economically feasible. Second, except in the rarest of cases, review by this Court is far from certain, even when the decision below is wrong and even when there is a conflict among the Circuits. And *en banc* review by the federal courts of appeals is also rare. As a consequence, litigants should not forfeit their fundamental right to have their case decided according to the law simply because their trial counsel accept what reasonably appears to be adverse controlling Circuit precedent. On the contrary, litigants should be permitted to request a federal district court to revisit an issue after this Court has established a contrary precedent in their favor.[9]

[9] *See Morris v. American National Can Corp., supra* (although the defendant had foregone the opportunity to effect a change in the law, by seeking *en banc* review and/or review by this Court of the Circuit's decision that risk enhancement is permitted under federal fee-shifting statutes, the defendant was nevertheless entitled in the second appeal in the case to invoke the rule set forth in *Dague*).

The importance and unfairness of the D.C. Circuit's rule can be illustrated by two examples. First, at the time that *Kay v. Ehrler* was decided in April, 1991, there had been a conflict among the Circuits since at least 1983 over the issue whether FOIA (and presumably other federal fee-shifting statutes) permits an award of fees to attorneys who proceed *pro se*. *Compare Cuneo, supra, with Falcone v. IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984) (fees not permitted). This Court declined to resolve the conflict on at least two occasions, in 1984, when it declined to review *Falcone*, and in 1986, when it declined to review, over the dissent of two Justices, *Poythress v. Kessler*, 475 U.S. 1129 (1986), involving 42 U.S.C. § 1988. As a consequence, throughout much of the 1980's, the law governing the issue of fees for *pro se* attorneys was the conflicting law established by the various Circuits and the prospect of a resolution of this conflict by this Court seemed dim. In these circumstances, litigants who have the misfortune to be parties to cases governed by adverse Circuit precedent that is overturned by this Court during the litigation should not have their rights governed by a wrong legal rule merely because they reasonably believed that they were bound by that precedent.

A second example is derived from the events following this Court's 1987 decision in *Delaware Valley II*. In *Delaware Valley II*, this Court was unable to resolve definitively whether federal fee-shifting statutes permit a lodestar fee award to be enhanced in cases taken on a contingent-fee basis. Following *Delaware Valley II*, every federal court of appeals, up until December 13, 1991, had ruled that enhancement of the lodestar to reflect risk was permissible under the typical federal fee-shifting statute and, for the most part, had done so on the ground that Justice O'Connor's concurring opinion in *Delaware Valley II* was controlling.[10] In June, 1992,

[10] On December 13, 1991, the D.C. Circuit, sitting *en banc*, reversed its own Circuit precedent and ruled that risk enhancement is never permitted under the typical federal fee-shifting statute. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *cert. denied sub nom., King v. Ridley*, 112 U.S. 3054 (1992). The decisions of the other Circuits are collected in the Petition for a Writ of Certiorari filed in *King*.

however, this Court in *Dague* rejected the nearly unanimous position of the Circuits and ruled that risk enhancement is never permitted. In these circumstances, it would be unfair to require defendants throughout the country to pay risk enhancements to prevailing plaintiffs' counsel because, until *Dague*, they reasonably believed they were foreclosed by Circuit precedent from arguing that risk enhancement is never permitted under the typical federal fee-shifting statute.

Finally, judicial efficiency favors a rule that ordinarily permits a litigant to raise at the trial level a supervening decision of this Court overturning what had been the law of the Circuit governing his case and that does not require, as a condition of doing so, an attempt to distinguish what reasonably appears to be indistinguishable. Federal district court judges should not be asked to make a distinction between a Circuit court decision, which they are bound to follow, and the case before them, which is so tenuous that even moving counsel does not believe it is reasonable. The inevitable and costly result of the D.C. Circuit's rule, however, is to require trial counsel to raise such matters and federal courts to decide them, and to generate collateral sanctions litigation.

CONCLUSION

This case raises an important and constantly recurring issue that has been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari and reverse the decision below.

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